OCT 10 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 499

FRANK TENNYSON NEELY,

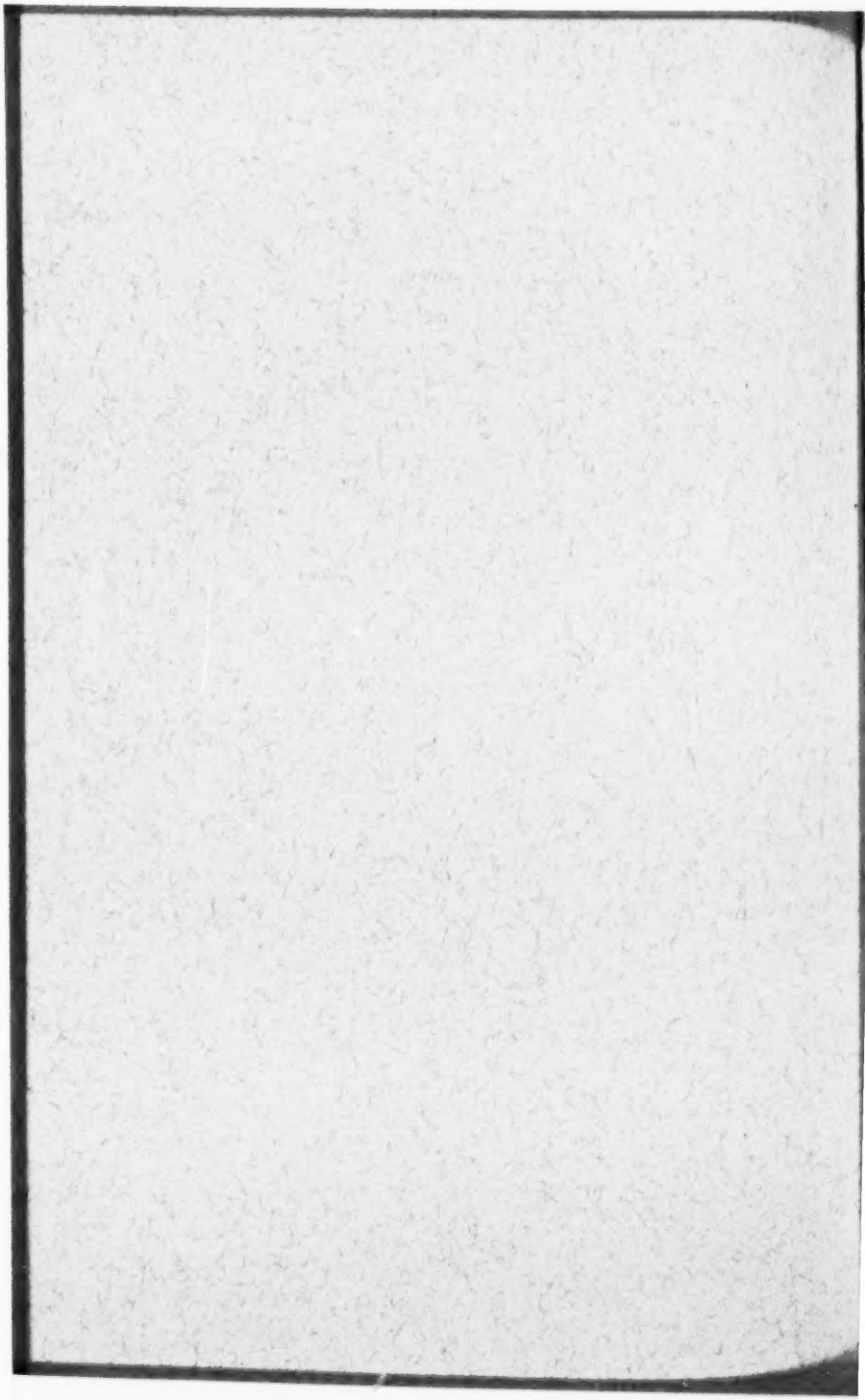
Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

WM. A. SCHNADER,
ALBERT G. AVERY,
GEORGE GORDON BATTLE,
Counsel for Petitioner.



INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Specification of errors to be urged	10
Reasons for granting the writ	11
Conclusion	18

Table of Cases Cited.

Aetna Ins. Co. v. *United Fruit Co.*, 304 U. S. 430	3
Alexander v. *Lewes*, 104 Wash. 32	13
Allison's Est., In re, 106 N. J. Eq. 55	14
Bentley v. *Lamb*, 112 Pa. 480	13
Berg v. *Moreau*, 199 Mo. 416	13
Berryman v. *Graham*, 21 N. J. Eq. 370	14
Bolmon, et al. v. *Overall*, 80 Ala. 451	11
Boone v. *Ridgway's Exrs.*, 29 N. J. Eq. 543	14
Brinker v. *Brinker*, 7 Pa. 53	11
Brinton v. *Van Cott*, 8 Utah 480	13
Brooks v. *Yarbrough*, 37 F. (2d) 527	12, 15
Brown v. *Sutton*, 129 U. S. 238	15
Burdine v. *Burdine's Exr.*, 98 Va. 515	13
Burmeister v. *Hamman*, 208 Iowa 412	11, 13
Burns v. *Smith*, 21 Mont. 251	13
Calef's Will, 109 N. J. Eq. 181, 11 N. J. Eq. 355	2, 12
Clark's Appeal, 57 Conn. 565	13
Cooper v. *Colson*, 66 N. J. Eq. 328	15
Corcoran v. *Kennedy*, 177 N. Y. App. Div. 63	13
Danenhauer v. *Danenhauer*, 105 N. J. Eq. 449	15
Davis v. *Wakelee*, 156 U. S. 680	14
Davison v. *Davison*, 13 N. J. Eq. 246	15
Dodd v. *Union Indemnity Co.*, 32 F. (2d) 512	13
Emery v. *Darling*, 50 Ohio 160	11
Erie R. Co. v. *Tompkins*, 304 U. S. 64	12

	Page
Flanagan v. *Flanagan*, 209 N. Y. App. Div. 190	18
Griffin v. *Whittemore*, 109 N. J. Eq. 204	16
Helvering v. *Mitchell*, 303 U. S. 391	18
Hiatt v. *Williams*, 72 Mo. 214	11
Jefferson v. *Simpson*, 83 W. Va. 274	13
Johnson v. *Hubbell*, 10 N. J. Eq. 332	12, 15
Johnson v. *McCue*, 34 Pa. 180	11
Journal Plaza Holding Co. v. *G. H. L. Co., Inc.*, 107 N. J. Eq. 14	16
Kastell v. *Hillman*, 53 N. J. Eq. 49	11, 16
Kelley v. *Devin*, 65 Ore. 211	13
Laune v. *Chandless*, 99 N. J. Eq. 186	11, 16
Lawrence v. *Prosser*, 88 N. J. Eq. 43	15
Lings v. *Urquhart*, 106 N. J. Eq. 506	15
Loffus v. *Maw*, 66 Eng. Repr. 544, 3 Giff. 592	4
Lovett v. *Lovett*, 86 Ind. App. 42	13
McLeon v. *Van Slyck*, 223 N. Y. 392	18
Maddox v. *Rowe*, 23 Ga. 431	11
Mauck v. *United States*, 94 F. (2d) 745	12
Merchants Ins. Co. v. *Lilgeomont*, 84 F. (2d) 685	13
Messinger v. *Paterson Savings Inst.*, 91 N. J. L. 654	14
Miller v. *Steele*, 153 Fed. 714	18
Moore's Admr. v. *Wagner's Admr.*, 243 Ky. 351	13
Monfort's Admr. v. *Rowland*, 38 N. J. Eq. 181	14
Naylor v. *Shelton*, 102 Ark. 30	11
Neely v. *Stacy*, 288 U. S. 606	2, 6, 12
Neubeck v. *Neubeck*, 94 N. J. Eq. 167	16
Neuman v. *Fantl*, 119 N. J. Eq. 351	14
Ochs v. *Ochs*, 122 N. J. Eq. 143	15
Ohlendiek v. *Schuler*, 299 Fed. 182	15
Oles v. *Wilson*, 57 Colo. 246	13
Page v. *Arkansas Natural Gas Corp.*, 53 F. (2d) 27	13, 14
Pflugar v. *Pultz*, 43 N. J. Eq. 440	15
Philadelphia, etc., R. R. Co. v. *Howard*, 13 How. 307	14
Railway Co. v. *McCarthy*, 96 U. S. 258	14
Riley v. *Allen*, 54 N. J. Eq. 495	15
Robinette v. *Olsen*, 114 Neb. 728	11
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202	3
Sanderson v. *Howell*, 121 N. J. Eq. 56	14

Page

Schutt v. *Missionary Soc. of the Methodist Episcopal Church*, 41 N. J. Eq. 115 ..... 12, 15
Skinner v. *Rasche*, 165 Ky. 108 11
Shatwell v. *Stickle*, 83 N. J. Eq. 188 16
Simmons, Ex Parte, 247 U. S. 231 16
Smith v. *Cameron*, 92 Kan. 652 13
Spencer v. *Spencer*, 25 R. I. 239 13
Throckmorton v. *Holt*, 180 U. S. 552 6
Torgerson v. *Hauge*, 34 N. D. 646 11
Townsend v. *Vanderwerker*, 160 U. S. 171 15
Turner v. *Kirkwood*, 62 F. (2d) 256 14
Van Duyne v. *Vreeland*, 12 N. J. Eq. 142 ..... 15, 16
Vreeland v. *Vreeland*, 53 N. J. Eq. 387 15
Vulcan Detinning Co. v. *American Can Co.*, 72 N. J. Eq. 387 16
Whitney v. *Hay*, 181 U. S. 77 15
Winfield v. *Bowen*, 65 N. J. Eq. 636 15
Woods v. *Dunn*, 81 Ore. 457 11
United States v. *Stevens*, 302 U. S. 623 12
Young v. *Young*, 45 N. J. Eq. 27 15
Zadig v. *Aetna Ins. Co.*, 42 F. (2d) 142 13

OTHER AUTHORITIES CITED.

Constitution of the United States, Fifth Amendment 11
Equity Rule 24 6
Federal Rules of Civil Procedure 52(b) 7
59 7
Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 347(a) 2
Pomeroy: Specific Performance (3rd ed.), p. 357 18
Rules of the Supreme Court of the United States, Rule 38 (5b) 2
1 Schouler: Wills (6th ed.), Sec. 698 18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 499

FRANK TENNYSON NEELY,

Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND FREDERICK H. TARR, AS ANCILLARY ADMINISTRATOR IN THE STATE OF MASSACHUSETTS OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. McCORMICK, HARRY McCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. McCORMICK.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Frank Tennyson Neely, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in

the above entitled case on June 29, 1940, which became final upon the denial of his petition for rehearing on September 11, 1940.

Opinions Below.

The opinion of the District Court, denying the motion to dismiss the bill of complaint, is reported in 16 F. Supp. 839 (R. 24-27), and its opinion dismissing the bill after trial is reported in 26 F. Supp. 130 (R. 1588-93). The opinion of the Circuit Court of Appeals denying the motion to dismiss the appeal is reported in 110 F. (2d) 525 (R. 1725); its opinion affirming the District Court is reported in 113 F. (2d) 953 (R. 1729), and its opinion denying the petition for reargument is unreported (R. 1737).[1]

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 29, 1940 (R. 1733). A petition for rehearing was duly filed on July 13, 1940 (R. 1734). It was denied on September 11, 1940 (R. 1737). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Section 347 (a), and Rule 38 (5b) of the Rules of this Court.

Questions Presented.

1. Whether petitioner is entitled to specific performance of a contract to devise and the impressment of a trust where the contract was not in issue, was judicially admitted in prior litigation between the parties, was established by parol and documentary proof, and petitioner had irretrievably changed his position by eight years' performance thereunder to the promisor's great benefit and satisfaction.

---

[1] The opinions in the prior proceedings between the parties *infra* are reported *sub nom. In re Calef's Will,* 109 N. J. Eq. 181; 111 N. J. Eq. 355; certiorari denied, *sub. nom. Neely* v. *Stacy et al.,* 288 U. S. 606 (1933).

2. Whether the decision below, denying such relief, conflicts with prior decisions of this Court, of the Second, Fourth, Fifth, Sixth, Eighth and Tenth Circuit Courts of Appeals and of the State courts of New Jersey.[2]

3. Whether the decision below denied petitioner due process of law by holding that he was bound to establish his case by anything more than a fair preponderance of the evidence and that he had failed as a matter of law to sustain such additional burden.

Statement.

In September 1921, after he had assisted her for a considerable period, the decedent, Eliza A. S. Calef, "employed" petitioner to extricate her from her grave financial difficulties and to provide and care for her during the rest of her life (R. 693-5, 1256-7, 1169-74, 1260, 898-9, 121, 315, 1160-1, 131-2, 1303-4). She was a widow, wholly estranged from her next of kin (the respondent cousins herein). She was faced with the loss of her home and litigation from creditors.[3] Petitioner was a man of standing, means and established skill in financial and business matters (R. 374-80, 1468-79, 176-8, 860-2, 116, 38-40). He assented to a mutual agreement whereby, in return for his assistance, care and services, he would receive decedent's residuary estate (if any) on her death, after trifling specific bequests

---

[2] *Cf. Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430, 434 (1938); *Ruhlin et al.* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 206 (1938).

[3] Decedent then owed her brokers $22,030.16 (which petitioner subsequently worked out for her after guaranteeing the account) and they were threatening suit (R. 738-40, 345-7, 402-3, 840-4); her home required immediate bulkhead construction costing over $6,000.00 (R. 317-20, 336-7); she had dissipated all her securities, had no income or means of support, and her living expenses were $6,000.00 annually (R. 967-8, 856-7, 969, 810); she was reduced to selling her furnishings and even talked of suicide (R. 46, 113-14, 121, 131-2, 232, 1220-2, 695-6).

to servants and intimate friends[4] (R. 11, 12, 1721-4, 25-6, 68). The agreement was confirmed by decedent to petitioner in her own hand on his birthday, September 10, 1921 (R. 1179-81, 124, 1309, 855-6, 1382, 1770), and on September 16, 1921, by her to a retired New Jersey attorney (R. 428, 1771-78). A few days thereafter, decedent consulted an attorney in New York City, stating she wished to make her will in conformity with her agreement (R. 67-68, 1184). She thereupon sent this attorney a memorandum, in her own hand, of the will. In it, as agreed, she devised her residuary estate to

> "my friend F. Tennyson Neely, of the City, County and State of New York, *in return for his services rendered to me at a time when I most needed them*" (R. 202, 1721-4).

On September 29, 1921, decedent accompanied petitioner to the attorney's office, where the will was prepared in their presence from her memorandum. It was then read aloud and approved (R. 70-1, 204). Decedent thereupon duly executed the will before witnesses and delivered the original to petitioner as the promisee therein named, saying "This concerns you, keep it"[5] (R. 71-3, 203-6, 1184-7, 1291).

Decedent thereafter affirmed this contract with petitioner in repeated spontaneous declarations to her closest friends, advisors and confidantes over the remaining eight years of her life, during which time petitioner remained with her and took care of her affairs, to the exclusion of other business opportunities (R. 121-2, 693-5, 428, 1294, 68, 681, 64, 41-3, 50-3, 613, 183-4, 435-6, 294-6, 358-9, 659-60, 674-6, 135, 197-9, 201, 159-61, 277, 267, 131, 148, 235, 243). Decedent never denied the contract to anyone.

---

[4] Pecuniary legacies of $7,150 and a few specified household objects of nominal value (R. 695-6).

[5] Similar to the factual situation involved, for example, in *Loffus* v. *Maw* [1862], 66 Eng. Repr. 544, 548, 3 Giff. 592, 604.

The District Court found that petitioner, in the last year alone of decedent's life, increased her estate by $60,000 (R. 1705-6).

Decedent died November 25, 1929, with petitioner's name on her lips (R. 243). The original will, which she had delivered to him eight years earlier, could not then be found, despite diligent search, and the conformed carbon copy, produced from the scrivener's files, was thereupon offered for probate in the New Jersey Prerogative Court as the copy of a lost will (R. 581-2, 1186). The respondent cousins herein, by their present counsel, opposed probate. The state court concluded, after a trial:

> "* * * for the purpose of this decision, it may be admitted that the will was duly executed; it was delivered to the proponent; he retained possession of it continuously thereafter until October 27th, 1929; until then it was Mrs. Calef's intention that that will should become effective upon her death; there was no undue influence used in procuring the execution of that will; and that the relations between Mrs. Calef and Mr. Neely were all that he claims and continued to be so until the end.
>
> "But I think it must be conceded that Mrs. Calef knew where the will was, even if she did not have the custody of it; she could, if she so desired, have obtained possession of it and destroyed it, at least after October 27th, 1929, and before November 16th, 1929, there being no doubt about access during that period; * * *
>
> "The presumption of destruction by the testatrix, *animo revocandi*, therefore prevails and the petition for probate will be dismissed." (*In re Calef's Will*, 109 N. J. Eq. 181, 199).

The New Jersey Court of Errors and Appeals thereafter affirmed this decision "for the reasons stated in the opinion filed in the court below" (*id.*, 111 N. J. Eq. 355). Reargument was denied, and on February 13, 1933, this Court

denied a petition for a writ of certiorari [*Neely* v. *Stacy, et al.*, 288 U. S. 606 (1933)], which was brought upon the ground that petitioner had been denied due process of law by the State court in erecting a *presumption* of revocation upon a second *presumption* of access to the will between October 27 and November 16, 1929—contrary to all the evidence that no one then knew where the will was or when it had disappeared,[6] there being no "access", logically, to a thing not shown to be in physical existence.[7]

The final decree of intestacy having judicially established decedent's breach of her contract to compensate petitioner by devise, this suit for relief in the nature of specific performance and the impressment of a trust upon the estate held by her representatives and distributees was instituted in 1933 in the District Court of New Jersey, there being present both requisite jurisdictional amount and diversity of citizenship (R. 7-19). Respondents moved to dismiss the complaint on various grounds (R. 19-22). *Three years* later, the motion was denied in an opinion by the District Judge (16 F. Supp. 839, R. 24-8), who held the complaint good in all respects. No appeal was ever taken from the order entered on that decision. Respondents then answered, denying generally the contract (R. 28-31). By order entered April 6, 1936, the District Court struck this denial as sham and in violation of Equity Rule 24 (then in force) [8] upon proof that respondents (by their present counsel) had judicially admitted the contract in the probate proceeding as one of the "*important facts which have been established*" in that case (R. 31-6). This order likewise was never ap-

---

[7] "A double inference is thus based upon a most insecure and dangerous foundation." *Cf. Throckmorton* v. *Holt*, 180 U. S. 552, 585 (1901).

[6] The will had been placed with petitioner's own will in decedent's favor and certain of his securities, all of which vanished (R. 580-2, 1070-2, 1504-6).

[8] Now F. R. C. P. 11.

pealed. It framed the issues and settled the law of the case. Nevertheless, the District Judge at the trial a year later (1937) required independent proofs of the contract from nine disinterested witnesses,[9] besides the conformed carbon copy of the will itself, which contained the contractual promise (R. 1721-4). He then denied respondents' motion to dismiss at the conclusion of petitioner's case (R. 476). A year later (1938), on the submission of findings, the District Court ruled that existence of this judicially admitted contract was the *only remaining issue in the case,* and respondents' counsel agreed that this was so (R. 1580, 1583-6). Petitioner thereupon requested a finding of the judicial admission (R. 1614), which request the District Judge received and marked "See order of April 6, 1936" (R. 1556-8), although he subsequently stated that he had stricken the request (R. 1701).

A year later (1939), the District Judge filed a memorandum and brief findings, dismissing the bill on the alternate grounds: (1) no contract had been proved, and (2) petitioner had not performed (R. 1593). A decree of dismissal was immediately entered *ex parte* on January 23, 1939 (R. 1594). Petitioner thereupon duly moved, under F. R. C. P. 52 (b) and 59 (then in force), to vacate the decree and correct the findings of fact (R. 1594-1622). At the hearing, eight months later, the District Judge ruled that the requested finding of judicial admission of the contract would be allowed (R. 1684). However, he refused, a month later, to incorporate such finding in his final decision, after respondents' counsel advised that "the finding of fact, if put in, virtually would reverse your Honor's entire decision, * * *" (R. 1696-7).

---

[9] Mrs. Clark (R. 694-5); Mrs. Colony (R. 50-2); Runyon (R. 427-8); Hume (R. 68-9, 202); B. Avery (R. 160-1, 183-4); Greer (R. 358-9); Wilcox (R. 197-199); Mrs. Cochran (R. 659-60, 674-5); Miss Fahrner (R. 235).

The District Court nevertheless found, in its amended decision of September 11, 1939, that decedent died November 25, 1929, leaving real and personal property in New Jersey and Massachusetts; respondents are her heirs and the domiciliary and ancillary administrators of her estate; she executed her aforesaid will on September 29, 1921, and delivered it to petitioner as custodian; probate of the carbon copy was denied by the State court on her death. The District Court further found that petitioner executed his own will as a mutual will in decedent's favor in the event he predeceased her; in December, 1928, she received a $250,000 inheritance which she commissioned petitioner to collect for her, and, *as a result of his efforts,* in 1929 she received cash distributions of $48,500, and real property was sold for $60,000 more than she would originally have taken; over the period 1921-1929, inclusive, decedent was estranged from the respondent cousins herein (R. 1702-6).

The District Court also found (over objection and despite prior rulings and concessions that these matters were irrelevant), that decedent loaned and advanced petitioner money against his receipt for speculation, to be repaid monthly;[10] his services were rendered in reliance on her generosity and the privilege of speculating in joint account with her;[11] in December, 1929, he went to Cuba with $50,000, stating he had closed out certain joint accounts and that certain people could make trouble for him;[12] *he*

---

[10] $13,992 representing proceeds of a stock sale was so received, of which $9,200 was repaid in monthly installments (R. 484-7, 905, 936-43, 1005, 1044-8, 1215-6, 1400-1, 1897-9). Petitioner's total ascertained payments to decedent and for her benefit from his own monies over the period 1921-1929 were $55,598.09 (R. 745, 1889, 750-2, 1886, 1892, 753-4, 1890, 1204-5, 1068-9, 901, 1049-50, 981-5, 1449-51, 1027-8, 1065, 1839, 1847).

[11] There were no joint accounts. There was a single joint venture in General Motors (R. 1087-8, 981-5, 1449-51, 1027-8, 1839, 1847).

[12] The evidence does not support this finding (R. 538, 699).

attempted to obtain decedent's signature (while decedent was unconscious) to a will naming himself sole beneficiary;[13] he solicited the physician's wife (in 1929) to prevail on decedent to remember him by will;[14] and he received a deed to the New Jersey real property which on demand he reconveyed to decedent (R. 1702-6; *cf.* 1154, 1583-6, 700).

Appeal was taken to the Circuit Court of Appeals for the Third Circuit, where respondents' motion to dismiss as untimely was denied (110 F. (2d) 525, R. 1725). The Circuit Court then affirmed in a brief opinion, and held that petitioner had failed to sustain the "heavy burden" upon him to establish existence of the contract and his performance thereunder, because of the alleged effort of decedent's dressmaker to secure a will during decedent's last illness; conceding existence of the contract, petitioner did not perform, relied only on decedent's "generosity" and certain alleged (but unspecified) benefits, and did not meet the test of change of position requisite to the granting of specific performance; petitioner's visit to Cuba in 1929 (after the promisor's death), with $50,000[15] and certain trinkets (appraised at $243.50 and returned intact)[16] disproved his performance under the contract over the period 1921-1929.

The Circuit Court then held that the District Court's order of April 6, 1936, striking as sham respondents' denial of the contract, was error because respondents' prior judicial admission in the probate proceeding was allegedly based upon supposedly incompetent testimony; the Dis-

---

[13] There was no evidence at all to support this finding (see R. 510, 690, 700).

[14] The District Court cut off contradictory proof as "immaterial" (R. 700), yet made the finding.

[15] *Cf.* the transaction in General Motors stock, in which petitioner in October, 1929, personally paid decedent's loss of $14,634.19, and for which he was never reimbursed (R. 981-5, 1027-8, 1087-8, 1449-51, 1839, 1847).

[16] R. 393-4, 442-8, 536.

trict Court's action three years later, after the trial had concluded, properly cured that "error" [although the record cited (R. 1633-83) shows that on the next page thereof (R. 1684) this was not so]; the terms of the contract were not sufficiently certain to decree specific performance thereof and the impressment of a trust [although the District Court had held they were (R. 24-7) and this decision was never appealed]; plaintiff has "unclean" hands [although the trial court had ruled, and respondents conceded, there was no issue except the contract (R. 1580, 1583-6)].

Specification of Errors to be Urged.

The court below erred:

1. In refusing to hold, contrary to decisions of this Court and of the New Jersey courts, that the contract was judicially admitted and was therefore not in issue.

2. In holding, contrary to determinations of State and District Courts, that the contract terms were not precisely established by the will, which had been duly executed, delivered to the promisee therein named, and which he thereafter retained and relied upon during the eight years of his performance, down to at least within a month of the promisor's decease.

3. In holding, contrary to law, that adequacy of consideration for the promise to devise could be re-examined judicially, and in ignoring the District Court's finding that the promisee's performance was of substantial benefit to the promisor.

4. In refusing to hold, contrary to the rule in the Second, Fourth, Fifth, Eighth and Tenth Circuit Courts of Appeals, that the District Court's order of April 6, 1936, striking the denial of the contract, which order was never appealed, established the law of the case.

5. In holding, contrary to the rule in this Court, and in the Sixth and Tenth Circuit Courts of Appeals, that petitioner was not entitled to a decree, although, relying on the promise, he had irretrievably changed his position and fully performed to the promisor's complete satisfaction, and no equities existed in favor of her estranged and remote heirs.

6. In holding, contrary to decisions of this Court, that petitioner, as plaintiff in a civil action, was bound to establish his case by more than a fair preponderance of the evidence, despite the District Court's ruling that he had done so, and in thereby depriving petitioner of the due process of law guaranteed him by the Fifth Amendment to the Constitution of the United States.

Reasons for Granting the Writ.

It is patent, from a restatement of the confused and conflicting findings and decisions below in this tortuous litigation, that a grave injustice has been done this petitioner. No proof of the contract was or could be stronger than execution by the promisor of the will containing her solemn obligation to devise "in return for his services rendered to me at a time when I most needed them" (R. 202, 1722-3). The rule in New Jersey (as elsewhere [17]) is that *this paper proved the contract* even though ineffective as a will [*Laune* v. *Chandless*, 99 N. J. Eq. 186, 187 (1926); *Kastell* v. *Hillman*, 53 N. J. Eq. 49, (1894)]. The District Court

---

[17] *Bolman et al.* v. *Overall*, 80 Ala. 451 (1886); *Naylor* v. *Shelton*, 102 Ark. 30 (1912); *Maddox* v. *Rowe*, 23 Ga. 431 (1857); *Burmeister* v. *Hamman*, 208 Iowa 412 (1929); *Skinner* v. *Rasche*, 165 Ky. 108 (1915); *Hiatt* v. *Williams*, 72 Mo. 214 (1880); *Torgerson* v. *Hauge*, 34 N. D. 646 (1916); *Robinette* v. *Olsen*, 114 Neb. 728 (1926); *Woods* v. *Dunn*, 81 Ore. 457 (1916); *Emery* v. *Darling*, 50 Ohio 160 (1893); *Brinker* v. *Brinker*, 7 Pa. 53, 56 (1847); *Johnson* v. *McCue*, 34 Pa. 180 (1859).

so held (16 F. Supp. 839, R. 24-7). However, the Circuit Court of Appeals, ignoring this unanswerable proposition, held no contract was established, thereby creating a conflict with the local rule applicable [*Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)].

The contract, thus established, was never breached or repudiated by the deceased promisor. The State court merely presumed she had revoked her will because it also presumed she had access thereto for a period of 20 days,[18] but there was no proof of such access, of repossession or of destruction *animo revocandi* [In re *Calef's Will*, 109 N. J. Eq. 181, 199, (1931); 111 N. J. Eq. 354 (1932), cert. denied *sub nom. Neely* v. *Stacy, et al.*, 288 U. S. 606 (1933)]. Consequently, since repudiation or rescission of the contractual obligation by the deceased promisor was never claimed or shown, her distributees and successors in interest are bound by her contractual obligation and are estopped to assert otherwise [*United States* v. *Stevens*, 302 U. S. 623, 627 (1938); *Mauck* v. *United States*, 94 F. (2d) 745 (C. C. A. 9th 1938)]. The Circuit Court of Appeals' decision is in conflict with these authorities.

Likewise, it is elementary that adequacy of consideration is not open to judicial inquiry, and that it was enough if petitioner's performance was satisfactory to the promisor over the life of the contract, however inadequate it may now seem to strangers. The Circuit Court of Appeals therefore could not question its sufficiency. This is the rule of New Jersey [*Johnson* v. *Hubbell*, 10 N. J. Eq. 332, 335 (1855); *Schutt* v. *Missionary Soc. of the Methodist Episcopal Church*, 41 N. J. Eq. 115 (1886)]; of the Tenth Circuit [*Brooks* v. *Yarbrough*, 37 F. (2d) 527, 534 (C. C. A. 10th,

---

[18] The District Judge recognized this (R. 1519, 1606) although reversing himself subsequently (R. 1588).

1930)]; and generally the rule elsewhere.[19] The District Court recognized this when it held the *only* question in the case was the contract, and respondents' counsel agreed (R. 1153-4, 1580, 1583-4). Plainly, performance was not an issue. Nor could the Circuit Court disturb the unchallenged finding of the District Court that petitioner's performance benefited the decedent to the tune of at least $60,000 in the last year alone of her life (R. 1705-6). This was why decedent's repeated declarations were to the effect that petitioner, over the entire eight years of his performance, had been a "godsend" and "a port in every storm" (R. 131, 148, 64, 41-3, 50-3, 358, 435-6, 658-60, 164, 197-8, 267, 235, 107, 277, 243).

This left only the contract. However, that was not in issue under the pleadings, as framed by the order of April 6, 1936, entered a year prior to the trial and never appealed or vacated. The decision below, holding that this order should be ignored, and that issues could be reframed *after* trial and the complaint then dismissed (two years later) for failure to prove an issue hitherto non-existent, is contrary to decisions in the Second, Fourth, Fifth, Eighth and Tenth Circuits, that this order settled the law of the case [*Zadig* v. *Aetna Ins. Co.*, 42 F. (2d) 142, 144 (C. C. A. 2nd, 1930); *Dodd* v. *Union Indemnity Co.*, 32 F. (2d) 512 C. C. A. 4th 1929); *Merchants Ins. Co.* v. *Lilgeomont, et al.*, 84 F. (2d) 685, 688 (C. C. A. 5th, 1936); *Page* v. *Arkansas Natural Gas*

---

[19] *Oles* v. *Wilson*, 57 Colo. 246 (1914); *Clark's Appeal*, 57 Conn. 565 (1889); *Burmeister* v. *Hamman*, 208 Iowa 412 (1929); *Lovett* v. *Lovett*, 87 Ind. App. 42 (1927); *Smith* v. *Cameron*, 92 Kan. 652 (1914); *Moore's Admr.* v. *Wager's Admr.*, 243 Ky. 351 (1932); *Berg* v. *Moreau*, 199 Mo. 416 (1906); *Burns* v. *Smith*, 21 Mont. 251 (1898); *Corcoran* v. *Kennedy*, 177 N. Y. App. Div. 63 (3d Dep't, 1917); *Kelley* v. *Devin*, 65 Ore. 211 (1913); *Bentley* v. *Lamb*, 112 Pa. 480 (1886); *Spencer* v. *Spencer*, 25 R. I. 239 (1903); *Brinton* v. *Van Cott*, 8 Utah 480 (1893); *Burdine* v. *Burdine's Exr.*, 98 Va. 515 (1900); *Alexander* v. *Lewes*, 104 Wash. 32 (1918); *Jefferson* v. *Simpson*, 83 W. Va. 274 (1919).

Corp., 53 F. (2d) 27, 31 (C. C. A. 5th, 1931); *Turner* v. *Kirkwood*, 62 F. (2d) 256, 259 (C. C. A. 10th, 1932)].

But even disregarding all this, the contract was judicially admitted, as the District Court held on three separate occasions (R. 36, 1557-8, 1585, 1684), as a fact solemnly established in prior litigation between the same parties. Respondents were estopped to shift their position subsequently and to assert otherwise (*Philadelphia Etc. R. R. Co.* v. *Howard*, 13 How. 307, 336-7 (1851); *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267-8 (1877); *Davis* v. *Wakelee*, 156 U. S. 680 (1895); *In re Allison's Est.*, 106 N. J. Eq. 55 (1930)]. They could not blow hot and cold (*id.*). The decision of the Circuit Court patently conflicts with these authorities.

Moreover, it has never been the law, as the Circuit Court held, that an admission to be effective must be based upon competent evidence.[20] On the contrary, admissions supplant other evidence and dispense with formal proof of facts often not otherwise available.

Disregarding all this, even had there been no will and positive proof of a newly executed will which omitted all provision for petitioner, no judicial admission of the contract and no striking of the denial thereof, under the facts and circumstances here disclosed—change of position, eight years' continuous performance to the promisor's satisfaction, substantial benefits to her in that through the prom-

---

[20] The Circuit Court here again erred in applying the New Jersey law (N. J. R. S. 2:97-2), which did *not* seal petitioner's lips as to transactions with the decedent where the door had been opened wide by respondents' cross-examination [R. 1382, *Messinger* v. *Paterson Savings Inst.*, 91 N. J. L. 654 (1918); see also *Berryman* v. *Graham*, 21 N. J. Eq. 370, 372 (1869); *Boone* v. *Ridgway's Exrs.*, 29 N. J. Eq. 543, 545 (1878); *Monfort's Admr.* v. *Rowland*, 38 N. J. Eq. 181, 183 (1884), aff'd, 40 N. J. Eq. 281 (1885)], and where the counterclaim based on alleged misconduct was not withdrawn until the close of the case [R. 1154, N. J. R. S. 2:97-2; *Neuman* v. *Fantl*, 119 N. J. Eq. 351 (1936). See also *Sanderson* v. *Howell*, 121 N. J. Eq. 56, 58 (1936)].

isee's solitary assistance her remaining years were spent in her desired style and comfort, freed of worry and responsibility, while her resources were increased by at least $60,000—these facts, plus her own repeated declarations of her agreement to disinterested witnesses from virtually all over the country, lawyers, advisors, neighbors, trusted friends and servants, bring this case within the controlling decisions of this Court [*Brown* v. *Sutton*, 129 U. S. 238 (1889); *Townsend* v. *Vanderwerker*, 160 U. S. 171 (1895); *Whitney* v. *Hay*, 181 U. S. 77 (1901)], of the Sixth and Tenth Circuit Courts of Appeals [*Ohlendiek* v. *Schuler*, 299 Fed. 182 (C. C. A. 6th, 1924); *Brooks* v. *Yarbrough*, 37 F. (2d) 527 (C. C. A. 10th, 1930)], and of the New Jersey State courts [*Johnson* v. *Hubbell*, 10 N. J. Eq. 332 (1855); *Van Duyne* v. *Vreeland*, 12 N. J. Eq. 142 (1858); *Davison* v. *Davison*, 13 N. J. Eq. 246 (1861); *Schutt* v. *Missionary Soc. of the Methodist Episcopal Church*, 41 N. J. Eq. 115 (1886); *Pflugar* v. *Pultz*, 43 N. J. Eq. 440 (1887); *Young* v. *Young*, 45 N. J. Eq. 27 (1889); *Vreeland* v. *Vreeland*, 53 N. J. Eq. 387 (1895); *Riley* v. *Allen*, 54 N. J. Eq. 495 (1896); *Winfield* v. *Bowen*, 65 N. J. Eq. 636 (1903); *Lawrence* v. *Prosser*, 88 N. J. Eq. 43 (1917); *Danenhauer* v. *Danenhauer*, 105 N. J. Eq. 449 (1930); *Ochs* v. *Ochs*, 122 N. J. Eq. 143 (1937)]. The opinion of the Circuit Court consequently is in direct conflict with these decisions of Federal and State courts, where specific performance was decreed upon evidence far less conclusive than that here presented.[21]

---

[21] The decisions of *Vreeland* v. *Vreeland*, 53 N. J. Eq. 387 (1895), *Cooper* v. *Colson*, 66 N. J. Eq. 328 (1904), and *Lings* v. *Urquhart*, 106 N. J. Eq. 506 (1930), cited by the court below, are readily distinguishable. In *Cooper* v. *Colson*, the promisee merely continued to perform her usual duties as housekeeper, the services were not unique, and the agreement rested in parol only. In *Lings* v. *Urquhart*, the only evidence of the contract was parol testimony of the promisee and his business associate, and the former's conveyance to the promisor (his wife, 20 years his junior) was found to be not in return for her promise to devise but in fact to avoid creditors. In *Vreeland* v. *Vreeland*, specific performance was decreed.

Likewise the District Court properly held the contract was specific, definite and certain, since its exact terms could be established by competent proof of the contents of the will therein referred to (16 F. Supp. 839, R. 24-7). In this it was clearly right, and the Circuit Court's decision to the contrary plainly conflicts with the New Jersey rule laid down in *Laune* v. *Chandless,* 99 N. J. Eq. 186, 187 (1926), *supra,* and *Kastell* v. *Hillman,* 53 N. J. Eq. 49, 50 (1894), *supra.* It was immaterial whether the promisor's estate subsequently diminished or increased. The contract was for the net residuary estate after certain specific deductions [*Van Duyne* v. *Vreeland,* 12 N. J. Eq. 142 (1858)], and this Court has plainly held equitable relief proper in such instance [*Ex Parte Simmons,* 247 U. S. 231, 239 (1918)].

Again, the Circuit Court ignored the local rule in holding that petitioner had "unclean hands". There was no pleading, proof or presumption of unconscionable conduct based upon actual knowledge or wilful fraud [*Vulcan Detinning Co.* v. *American Can Co.,* 72 N. J. Eq. 387 (1907); *Shotwell* v. *Stickle,* 83 N. J. Eq. 188, 193 (1914); *Journal Plaza Holding Co.* v. *G. H. L. Co., Inc.,* 107 N. J. Eq. 14, 18-19 (1930)]. Nor was there misconduct performed in the particular matter or transaction for which relief is now sought [*Neubeck* v. *Neubeck,* 94 N. J. Eq. 167, 170 (1922); *Griffin* v. *Whittemore,* 109 N. J. Eq. 204, 205 (1931)]. The events, late in 1929, complained of by the Circuit Court, by these tests do not sustain a claim of unclean hands, for they bear no relation either to the existence of the contract made in 1921 or to the promisee's performance thereunder for eight years until the promisors' decease, and the District Court properly ruled they were without materiality (R. 700, 1583). Suffice it to note here: the alleged attempt to procure a new will was not attributable to petitioner but (if at all) to decedent's seamstress for thirty years, who stoutly denied the accusation (R. 510, 690, 700). The new draft had been

prepared and left by a local judge who was summoned pending discovery of the carbon copy of the missing 1921 will in New York (R. 499-501, 451). Petitioner was an elderly layman who consulted the local judge for advice and who was overwrought with the grief and stress of the occasion (R. 581, 499-501, 690-1). Moreover, the money petitioner took with him to Cuba (in December, 1929) was from his own bank account, following the closing of his own brokerage accounts on the eve of the great panic and crash of October, 1929, after he had personally paid decedent's stock loss of $14,639.49 in General Motors common stock (R. 859, 981-5, 1449-51, 1027-8, 1065, 1087-8, 1839, 1847). Petitioner returned directly to this country where he permanently resides. The counterclaim against him was voluntarily withdrawn at the conclusion of the trial (R. 1154). And the "jewelry" to which the Circuit Court referred (trinkets appraised at $243.50) was packed in petitioner's bag by a servant without his knowledge and, when discovered, was voluntarily returned intact, with a detailed inventory to the administrator *pendente lite* (R. 383, 397, 404-10, 442-8, 535-6, 1821, 1734-6).

In conclusion, this was a plain civil action. There was consequently no "heavy" or extraordinary burden of proof upon petitioner. The District Court concluded he had established a *prima facie* case (R. 476). Respondents' proofs did not thereafter disturb it. The court held, and respondents conceded, that *if the contract was established, petitioner was entitled to a decree in his favor* (R. 1583-5).[22] But the contract was not even in issue!

[22] *"The Court:* There is only one factor in the whole case, isn't there?
Mr. Parsons: Yes sir. After all is said and done that one factor is was there a contract or was there not;" (R. 1153-4).
"The Court: If I find a contract here, you are going out of court a loser.
Mr. Parsons: No question of it Judge; no question of it." (R. 1583.)
"The Court: • • • and we find here that this contract was that upon the death of Mrs. Calef, Mr. Neely was to have her estate and upon the death of Mr. Neely she was to have his." (R. 1585.)

Plainly, the Circuit Court erred in imposing an extraordinary and additional burden of proof.[23] This additional requirement, unheard of in a civil action [*cf. Helvering* v. *Mitchell*, 303 U. S. 391, 397 (1938)], violated petitioner's right to due process of law under the Fifth Amendment to the Federal Constitution.

Conclusion.

Petitioner is entitled to a writ of certiorari addressed to the United States Circuit Court of Appeals for the Third Circuit, to review and reverse the final judgment in this cause.

Respectfully submitted,

WM. A. SCHNADER,
ALBERT G. AVERY,
GEORGE GORDON BATTLE,
Attorneys for Petitioner.

---

[23] *Cf. Miller* v. *Steele*, 153 Fed. 714, 721 (C. C. A., 6th, 1907); *McKeon* v. *Van Slyck*, 223 N. Y. 392, 397 (1918); *Flanagan* v. *Flanagan*, 209 N. Y. App. Div. 190, 191 (4th Dep't, 1924); 1 Schouler: Wills (6th ed.) Sec. 698; Pomeroy: Specific Performance (3rd ed.) p. 357.